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Bell v. Jet Wheel Blast: More Confusion in an Already Confused Area

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After years of uncertainty in Louisiana with respect to the application of comparative fault to strict products liability, the United States Court of Appeals for the Fifth Circuit certified the following question to the Louisiana Supreme Court: "Does the Louisiana Civil Code permit the defense known as contributory negligence to be advanced to defeat or mitigate a claim of strict liability based upon a defective product, the theory of liability commonly known as 'products liability?'"[1] This note attempts to analyze the rather confusing answer given by the Louisiana Supreme Court in *Bell v. Jet Wheel Blast*.[2]

In *Jet Wheel*, plaintiff brought suit to recover damages for injuries occasioned while working on a large shot blast machine which defendant had manufactured and installed. Plaintiff's injury occurred when his hand got caught in the chain and sprocket drive of the machine's conveyor system. The jury found that the shot blast machine was defective, and that the defect was the proximate cause of the injury. Nevertheless, the jury also found that the plaintiff was contributorily negligent.[3] Defendant contended that the finding of contributory negligence exonerated it from liability because the finding constituted "victim fault" under Louisiana law.[4] In answering the certified question submitted by the Fifth Circuit, the Louisiana Supreme Court stated:

> Contributory negligence does not apply in strict products liability actions. The principle of comparative fault may be applied in some products cases according to precepts formulated by analogy to the principle of Civil Code article 2323. The principle does not apply, however, and the plaintiff's recovery cannot be diminished in a case such as the present one involving an industrial accident resulting in injury to an employee's hand due to defective machinery and the employee's ordinary contributory negligence. Under these circumstances the application of comparative fault would tend to defeat the basic goals of strict products

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1. Bell v. Jet Wheel Blast, 462 So. 2d. 166, 168 (La. 1985).
2. 462 So. 2d 166 (La. 1985).
3. Id. at 167-68.
4. Id. at 168.

liability without providing any additional incentive for careful product use.[5]

The court based its decision not to reduce plaintiff's award on the fact that plaintiff was injured while performing a repetitive operation with a defective industrial machine as required by his employer. Plaintiff's hand got caught in the machine both because the front of the machine lacked an adequate guard and because of his own negligence in operating the machine. The court reasoned that, "[u]nder these circumstances, the application of comparative fault would not serve to provide any greater incentive to an employee to guard against momentary neglect or inattention so as to prevent his hand from being mangled by machinery."[6] Justice Dennis, writing for the majority, reasoned that the recovery of a plaintiff who has been injured by a defective product should not be reduced in those cases where it does not realistically serve to promote careful product use or where it drastically reduces the manufacturer's incentive to make a safe product.

The court's comparative negligence analysis provides little guidance for the lower courts in deciding when contributory negligence will reduce a plaintiff's award in a strict products liability case. By stating that a plaintiff's contributory negligence will reduce his recovery only where it will encourage careful product use *and* where it will not reduce incentives for manufacturers to create safe products, the supreme court requires lower courts to decide on an ad hoc basis whether or not to reduce a plaintiff's recovery. The absence of a sound analytical basis to the result reached in *Jet Wheel* (as will be shown below) prevents litigants from being able to forecast with any certainty whether contributory negligence will reduce a plaintiff's recovery in a strict products liability action.

Justice Blanche in his dissent stated that "the bench and bar would be better served if the doctrine of comparative negligence would be applied uniformly."[8] Justice Blanche explained that "[i]t would be a simple matter to apply comparative negligence in all cases where the fault of both parties contributes to the injury."[9] Instead, Blanche argued,

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5. Id. at 173. La. Civ. Code art. 2323 states:

When contributory negligence is applicable to a claim for damages, its effects shall be as follows: If a person suffers injury, death, or loss as the result partly of his own negligence and partly as the result of the fault of another person or persons, the claim for damages shall not thereby be defeated, but the amount of damages recoverable shall be reduced in proportion to the degree or percentage of negligence attributable to the person suffering the injury, death, or loss.

6. Id. at 172.
7. Id. at 171-72.
8. Id. at 174.
9. Id. at 174.

the majority has complicated the legislative effort to do justice between litigants by deciding that in a products liability case comparative negligence will be applied only where these pro-safety policy inquiries are answered affirmatively.[10] Justice Blanche's solution in *Jet Wheel* was to assess the manufacturer with anywhere from ninety-five to ninety-nine percent of the fault and the injured worker with the remainder.[11] He reasoned that since the plaintiff was injured while working with his hands on a defective machine for another's profit, this small reduction would require the plaintiff to be responsible for his fault while the manufacturer would be sufficiently penalized to encourage it to produce safer products.[12] The writer agrees with Justice Blanche especially in light of the unfairness that would follow where the defendant was held liable without having been negligent (which is possible under strict liability) while, at the same time, a negligent plaintiff was allowed to recover one hundred percent of his damages and escape responsibility for his own fault. A basic premise of strict liability is that as between two innocent parties, the manufacturer and the consumer, the manufacturer should bear the loss. Therefore, it appears ironic to allow a negligent defendant to escape total liability by reducing the plaintiff's award because of contributory negligence, and then subject a non-negligent manufacturer to total liability in favor of a contributorily negligent plaintiff merely because he is liable under the theory of strict liability.[13]

Some of the cases interpreting *Jet Wheel* demonstrate some of the problems resulting from that decision. In *Holmes v. State*,[14] plaintiff-driver sued the Department of Highways (DOTD) for damages caused by a defective road shoulder. When plaintiff allowed the left wheels of his car to stray onto the shoulder, the wheels hit a five inch rut in the highway and caused an accident. The third circuit found the DOTD strictly liable under article 2317 of the Civil Code[15] for the defective shoulder, and it also found the plaintiff to be contributorily negligent.[16] Although the court recognized that this was not technically a products liability case, it looked to the policy considerations espoused in *Jet Wheel* to determine whether to reduce the plaintiff's award: "Would

10. Id.

11. 462 So. 2d at 174.

12. Id.

13. See Sullivan v. Gulf States Utilities Co., 382 So. 2d. 184, 189 (La. App. 1st Cir. 1980).

14. 466 So. 2d 811 (La. App. 3d Cir. 1985).

15. La. Civ. Code art. 2317 states: "We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody."

16. 466 So. 2d at 823.

reducing [the plaintiff's] award act as an incentive for motorists to operate their vehicles more safely on the highways? We think that it would. Will the reduction of [the plaintiff's] award lessen the incentive of DOTD to maintain reasonably safe highways and shoulders? We think not."[17] Therefore, the court held that this was an appropriate case for the application of comparative negligence.

The *Holmes* court provided no underlying legal analysis for its result. The court's decision to decrease plaintiff's award can be explained only as a visceral response by the judges to the policy questions with which they were confronted. It is difficult to understand why a negligent worker injured by a defective machine may recover all of his damages, and a negligent driver injured by an equally defective highway may only recover part of his damages. The driver, but not the worker, is held accountable for his own inadvertence. Arguably, reducing one worker's recovery based on his negligence encourages all workers to be more careful, without reducing the incentive for the manufacturer to produce safe products because the manufacturer knows it will be exposed to at least some liability. The possibility that a court might apportion ninety-five percent of the fault to the manufacturer should be incentive enough to encourage it to make safe products. The worker/driver distinction is not significant enough to warrant different results.

In *Turner v. New Orleans Public Service Inc.*,[18] Justice Blanche reiterated the defect with *Jet Wheel*'s reasoning:

> To say that the doctrine of comparative fault will only be applied in certain cases simply ignores the obvious intent of the legislature in adopting the comparative fault statute. Language such as that found in Jet Wheel Blast . . . is nothing more than saying that cases will be decided on a socioeconomic basis rather than following the clear requirement of the law. It tells the trial courts to first balance the rights and duties of parties, determine what result is wanted and then decide if the law should be applied. This simply is not what was intended. La. C.C. art. 2323 requires that the plaintiff's recovery be reduced to the extent of his fault in *all* cases arising under comparative fault.[19]

Justice Blanche describes is exactly what happened in *Holmes*. Since holding the state strictly liable is not favored in Louisiana,[20] it is entirely plausible that part of the court's rationale for decreasing the plaintiff's award was based on economic considerations rather than on the clear

17. 466 So. 2d at 824.

18. 471 So. 2d 709 (La. 1985).

19. Id. at 715 (Blanche, J., concurring).

20. 1985 La. Acts No. 454 eliminates a plaintiff's strict liability action against the state or any of its entities.

requirement of Civil Code Article 2323. Nevertheless, uniformity of decision is a crucial objective of any legal system. The *Holmes* and *Jet Wheel* reasoning reduces any possibility of uniform results with respect to the application of comparative negligence to strict liability in Louisiana.

In *Turner v. New Orleans Public Service, Inc.*,[21] the supreme court held that comparative negligence applies to reduce a pedestrian plaintiff's award against a motorist. Justice Dennis distinguished *Jet Wheel*, stating that pedestrians are in a better position to avoid collisions with negligent drivers than laborers are to escape injury by defective machinery with which they are forced to work due to economic circumstances. He reasoned that if a pedestrian knows his fault will reduce recovery then he at least has greater power and opportunity to prevent the accident.[22]

Although *Turner* is a negligence case, the *Jet Wheel* policy considerations were used in Justice Dennis' reasoning. *Turner* addressed the question of whether reducing a plaintiff's award will increase consumer—i.e., pedestrian—safety. Why is a pedestrian walking on a highway in a better position to avoid an accident with an automobile than a worker who usually has the skill and training needed to operate the defective product? If reducing a pedestrian's award because of his negligence serves to increase pedestrian safety, logic dictates that reducing a worker's award because of his negligence tends to force the worker to use the product more safely. Part of Justice Dennis' reasoning in *Turner* is that justice requires that the pedestrian be held accountable for his own negligence.[23] Should not the same justice be applied to a worker like the one in *Jet Wheel*?

The first circuit apparently disapproved of *Jet Wheel* when it applied comparative negligence to a recent strict liability case arising under Civil Code article 2317. The court quoted the language in Justice Blanche's dissent: " 'It would be a simple matter to apply comparative negligence in all cases where the fault of both parties contributes [to] the injury, whether under Civil Code Article 2315 or Article 2317 or *any other conceivable theory of liability*.' "[24]

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21. 471 So. 2d. 709 (La. 1985).

22. 475 So. 2d. 765 (La. 1985). These additional reasons were omitted from the bound volume of the Southern Reporter, but they were in the paperback reporters. Nevertheless, the additional reasons were assigned by Justice Dennis, the author of the *Jet Wheel* majority opinion, and his comments are relevant.

23. 475 So. 2d. at 767.

24. Turner v. Safeco Ins. Co. of America, 472 So. 2d. 43, 48 (La. App. 1st Cir. 1985) (emphasis added by *Turner* court). See also Davis v. Marshall, 467 So. 2d 1211, 1216 (La. App. 1st Cir. 1985), where Judge Sexton cited *Jet Wheel* and pleaded for new legislation with respect to the application of comparative negligence to products liability because of the complex state of the law at the present time.

Jet Wheel's ambiguity is further exemplified in *Hayes v. State*,[25] where the DOTD was held strictly liable to a motorist for a defective road shoulder. Using the *Jet Wheel* rationale, the third circuit held that the motorist's contributory negligence would reduce his claim because "society's reliance on automotive transportation and the need for the safe operation of the motoring public on roadways free from hazards which create an unreasonable risk of harm is best served up by the application of comparative negligence."[26] The court did not mention *Jet Wheel*'s other prong: that the plaintiff's recovery will not be reduced if such a reduction would reduce the manufacturer's incentive to create safe products or things. If the *Jet Wheel* reasoning were used in its entirety, it could be argued that reducing the motorist's award would certainly reduce the DOTD's incentive to make safe road shoulders.

Hayes illustrates the flaw in the *Jet Wheel* rationale and the necessity for a uniform application of comparative negligence. *Jet Wheel* allows the trial court to pick and choose which policy questions it wishes to address and to answer those questions based on whether or not that particular court believes the plaintiff's recovery should be decreased. The court in *Hayes* narrowed the *Jet Wheel* two-pronged test to a single inquiry which it answered in one sentence. It is possible that courts who address this issue in the future may eliminate discussing all of *Jet Wheel*'s policy questions. Thus, courts may, without any legal analysis, decide cases on an ad hoc basis, saying certain cases are, and certain cases are not, appropriate for applying comparative negligence. Clearly, uniformity of decision will suffer.

One reason for the court's refusal to reduce the plaintiff's recovery in *Jet Wheel* was that economic conditions forced his encounter with the machine; he was therefore held to a lower standard of care with respect to protecting himself.[27] It seems, however, that economic conditions force many motorists to be on the road: they must shop for food, take their children to school, and get to and from work. Nevertheless, the negligent motorist on a pleasure trip confronts the risks of "defective" highways in a manner indistinguishable from the negligent motorist whose presence on the road is due to economic necessity. A formula which allows the latter to recover and not the former seems unjust.

In *Barnett v. Gehl Co.*,[28] the United States District Court for the Western District of Louisiana held that comparative negligence could

25. 467 So. 2d 604 (La. App. 3d Cir. 1985).

26. Id. at 609.

27. 462 So. 2d at 172. See also Lanclos v. Rockwell Int'l Corp., 470 So. 2d. 924, 933 (La. App. 3d Cir. 1985).

28. 605 F. Supp. 183 (W.D. La. 1985).

be asserted as a defense to a products liability action, where the consumer was not operating a machine in an industrial setting as required by his employer, but rather, was independently operating a machine in a farm setting.[29] The court, admitting that *Jet Wheel* is rife with uncertainty,[30] distinguished *Jet Wheel* because there the plaintiff was injured while performing a repetitive operation with a defective industrial machine as required by his employer.[31] The court reasoned that the threat of reduction in recovery would provide the user of the product with an incentive to use it carefully but would not reduce the manufacturer's incentive to make a safer product.[32] The *Barnett* court, following the *Jet Wheel* rationale, did not explain why a worker doing repetitive tasks was not held accountable for his own negligence, but a farm worker who was probably forced to work on the farm machine because of similar economic conditions was held accountable for his negligence.

The threat of diminished recovery increases a worker's incentive to use products safely whether in an industrial setting or a farm setting. In addition, the possibility that the manufacturer may have to pay ninety-nine percent of the recovery to anyone will certainly provide incentive for it to produce safe products. There is no clear reason to distinguish between the two situations. If *Jet Wheel* is applied by other state courts, Louisiana will have one distinct class of persons (industrial workers doing repetitive tasks) to whom comparative negligence will not apply. Such a classification does not seem fair, and could present certain constitutional problems.[33]

The equal protection clause of the Fourteenth Amendment guarantees that those people who are similarly situated will be treated similarly.[34] Civil Code Article 2323 may not on its face draw any classification, but it may nonetheless be applied in a way that classes are in fact being drawn in the judicial process.[35] By not applying the principles of comparative negligence to industrial workers doing repetitive tasks, the state is arguably creating an unreasonable classification of persons.

It seems unfair to allow a worker who is skilled and experienced in the use of a product to escape liability for his own negligence, but

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29. Id. at 185.
30. Id. at 184.
31. Id. at 185.
32. Id.
33. This article is not an exposition of all of *Jet Wheel*'s constitutional ramifications. The basic questions of whether these two types of plaintiffs are similarly situated, or whether the court should use the rational basis test or strict scrutiny test is not addressed. In this context, the argument is merely presented for reflection and to point out some of the possible problems with *Jet Wheel*.
34. U.S. Const. Amend. XIV. L. Tribe, American Constitutional Law 993 (1978).
35. J. Nowak, R. Rotunda, & J. Young, Constitutional Law 524 (1978).

to hold an unskilled consumer accountable for his contributory negligence. Since the ability to spread loss is an important policy consideration in imposing strict liability on manufacturers of products, it should be remembered that a skilled worker is usually in a much better position to spread the loss than is an average consumer. Not only does the worker have access to workers' compensation laws, but in all probability his employer has some other sort of health insurance to cover him for on-the job accidents. Since the worker has this protection, it would be absurd not to hold him accountable for his own negligence. Certainly the average consumer does not have this much protection against accidents.

One other problem created by not applying comparative negligence across the board arises in the context of multiparty litigation. For example, suppose an industrial worker performing a repetitive task is injured in part through the combined negligence of himself and a third person, and also because of a defective machine. This worker would sue the third person in negligence and the manufacturer of the machine in strict products liability. According to *Jet Wheel* the worker could recover his total damages from the manufacturer, but his recovery would be reduced against the negligent third person because of the worker's contributory negligence. Not only is it unfair to reduce the worker's award against a negligent defendant and not against a strictly liable defendant, but if a few more parties were added to the litigation, the trial might well become too complicated for a jury to understand. Professor Roberts of the University of Texas Law School states that, "[u]nless comparative fault works across the board, multiparty litigation can become well-nigh impossible to administer."[36]

At least five strong arguments exists for applying comparative negligence uniformly to all strict liability defendants:[37]

(1) Any other resolution disagreeably complicates multiple defendant cases.

(2) It is anomalous to treat negligent defendants more favorably than strict liability defendants.

(3) It is more fair as between the plaintiff and the strict liability defendant to take the plaintiff's fault into account.

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36. Robertson, Ruminations on Comparative Fault, Duty/Risk Analysis, Affirmative Defenses, and Defense Doctrines in Negligence and Strict Liability Litigation in Louisiana. 44 La. L. Rev. 1341, 1354 (1984).

37. The opposite argument that comparative negligence offends the basic premises of strict products liability was stated by Judge Politz in the panel opinion in Lewis v. Timco, Inc., 697 F.2d. 1252 (5th Cir. 1983) and in his dissent from the *en banc* reversal, 716 F.2d at 1433 (5th Cir. 1983).

(4) To the extent that tort law deters substandard conduct, a deterrent effect is built into the reduction of the plaintiff's recovery on the basis of his own fault.

(5) To the extent that refusal to take plaintiff fault into account yields large recoveries against strictly liable defendants in favor of negligent plaintiffs, the strict liability theories themselves are brought into disrepute and a considerable incentive is created for the courts or legislature to abolish or curtail the operation of those doctrines.[38]

Not only are these reasons persuasive, but a number of courts in other jurisdictions have held that the rule of comparative negligence is, without exception, applicable to products liability actions based upon strict liability in tort.[39] In *Daly v. General Motors Corp.*,[40] the California Supreme Court held that "apportioning tort liability is sound, logical, and capable of wider application than to negligence cases alone, and that to hold otherwise would be to perpetuate a system which placed upon one party the entire burden of a loss for which two are, by hypothesis, responsible."[41] The court stressed that fairness required extending a full system of comparative fault to strict products liability.[42]

The problems created by the *Jet Wheel* decision should be recognized, and comparative fault principles should be uniformly applied to all strict products liability actions. Civil Code article 2323 states that "[i]f a person suffers injury . . . as a result partly of his own negligence and partly as a result of the *fault* of another person . . . the amount of damages recoverable shall be reduced."[43] "Fault" should be read to include all strict liability situations, not just a select few. The legislature did not expressly choose to except industrial workers performing repetitive tasks from the application of Article 2323. The court should not detract from the plain language of the statute by creating such an exception. Uniform application of comparative negligence will ameliorate the harshness of the complete bar of contributory negligence and will balance the manufacturer's responsibility to the public against the user's

38. See supra note 36.

39. See General Motors Corp. v. Hopkins, 548 S.W.2d 344 (Tex. 1977); Daly v. General Motors Corp., 20 Cal. 3d. 725 (1978); Dippel v. Sciana, 37 Wis. 2d 443 (1967). For cases involving industrial workers, see Ludwig v. Ermanco, Inc., 504 F. Supp. 1229 (E.D. Wis. 1981); Lenhern v. NRM Corp., 504 F. Supp. 165 (D. Kan. 1980). But see Suter v. San Angelo Foundary Mach. Co., 81 N.J. 150 (1979) which seems to follow the *Jet Wheel* rationale.

40. 20 Cal. 3d 725 (1978).

41. Id. at 727.

42. Id. at 727.

43. See supra note 5.

conduct in contributing to his own injuries. As of now, however, we must adhere to Justice Dennis' reasoning in *Jet Wheel*:

> Pending future judicial or legislative developments, we are content for the present to assume the position . . . [of] abstain[ing] from issuing a detailed guidebook to the new area of comparative negligence, preferring to adopt the view "that the trial judges of this State are capable of applying [a] comparative negligence rule without our setting guidelines in anticipation of expected problems."[44]

A "detailed guidebook" to the application of comparative fault principles is not necessary in light of the unambiguous wording of Civil Code article 2323; but until *Jet Wheel* is modified or overruled, an ad hoc approach goes on.

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44. 462 So. 2d at 172. Although the language used by Justice Dennis may be interpreted to mean that the application of comparative negligence to products liability is a jurisprudentially created rule which applied the principles of article 2323 by analogy, the writer believes that the lower courts will simply use the wording of article 2323 to apply comparative negligence to products liability in cases in which the issue of retroactivity of the statute is not an issue. Even if the court is creating a jurisprudential rule and not a statutory rule, application of the principle of article 2323 should at the very least include an analysis of the statute's wording.